Public Prosecutor v Pathmarajah a/l Mylvaganam

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-42K-(11&12)–12 OF 2022
MUNIANDY KANNYAPPAN J
11 AUGUST 2024

Criminal Procedure — Appeal — Appeal against acquittal — Lawyer was charged with abetting client to commit forgery for purpose of cheating ('predicate offence') — Lawyer was also charged with committing money laundering using proceeds from commission of predicate offence — Trial court acquitted and discharged accused on all charges at end of prosecution's case — Prosecution appealed against entire verdict but later withdrew appeal against accused's acquittal on predicate offence — Whether trial court's acquittal on predicate offence was correct as prosecution failed to prove charge — Whether acquittal of accused on money laundering charges was also sound as prosecution relied on same evidence it had used to prove predicate offence — Whether since accused was acquitted of predicate offence no 'unlawful activity' existed to justify charging him for committing money laundering offences

The respondent in this appeal ('the accused') was a lawyer who had acted for the seller of a property under a sale and purchase agreement ('SPA'). The buyer of the property paid RM3,076,803.40 into the client's account of the accused's legal firm as deposit for the purchase of the property under the SPA. The SPA was aborted when the seller failed to perform a crucial pre-condition. When the buyer asked for the return of the deposit, the accused replied that on the vendor's instructions, part of the deposit was returned to the vendor and other parts were paid to some third-parties as authorised by the vendor. Feeling cheated, the buyer lodged a police report. Following police investigations, the accused was charged in the sessions court with three charges of abetting a person ('SP6') — who had impersonated the real owner of the property — to forge the SPA and two letters of authorisation connected therewith, for the purpose of cheating pursuant to s 468 read together with s 109 of the Penal Code. The three charges constituted the predicate offences for another six charges of money laundering against the accused under s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUA'). The money laundering charges alleged that the monies constituting the deposit that was received from the buyer and subsequently dealt with by the accused's legal firm were proceeds of unlawful activities. After hearing a joint trial of all the predicate and AMLATFPUA offences, the sessions judge acquitted and discharged the accused of all the charges at the end of the prosecution's case without calling for the defence. The prosecution appealed against the whole of the decision but

later withdrew its appeal against the accused's acquittal on the predicate offences. A

Held, dismissing the appeal and affirming the trial court's decision:

(1) There was no cogent evidence before the trial court for it to find that the accused had abetted SP6 to commit the offence of forgery. Mere admission by SP6 that he was involved in the SPA did not automatically make the accused criminally liable. There was no evidence to show that the accused had instigated, conspired with or aided SP6 — all essential elements that had to be proven by the prosecution — to commit the forgery (see paras 15–16). B C

(2) Although pursuant to s 4(4) of the AMLATFPUA, an offence of money-laundering could stand alone from the predicate offences, the principal ingredient of commission of an unlawful activity by the accused must be proven and established, which in the present case was the serious offence of abetting SP6 to commit forgery for the purpose of cheating — which the prosecution had failed to prove against the accused at the prima facie stage (see para 47). D

(3) In order to prove the money laundering charges, the prosecution had relied wholly on the same evidence it had used to attempt to prove the predicate offences by showing that the accused had committed the unlawful activity of abetting SP6 to commit forgery for the purpose of cheating. However, the trial judge had found no nexus between the accused and the forgery and had acquitted and discharged him of the predicate offences. The prosecution withdrew its appeal against that acquittal. Therefore, since there was no evidence to show that the accused had committed any unlawful activity relating to the SPA, the money laundering charges against him stood unproven (see paras 53 & 55). E F G

(4) The prosecution's withdrawal of its appeal against the accused's acquittal on the predicate offences showed its lack of appreciation that in the absence of proof of commission of the predicate offences, there was no proof of an unlawful activity by the accused and hence no proof of the offence of money laundering as alleged against him. The predicate offence was the crime underlying the money-laundering activity, and in order to prove the money laundering offence, it was necessary for the prosecution to first prove that the predicate offences had been committed (see paras 44–45). H I

(5) The findings and conclusion arrived at by the trial judge, including her findings on the credibility of the prosecution witnesses and her decision to acquit and discharge the accused were correct and did not justify any appellate intervention (see para 56).

[Bahasa Malaysia summary

Responden dalam rayuan ini ('tertuduh') adalah seorang peguam yang bertindak bagi penjual hartanah di bawah perjanjian jual beli ('SPA'). Pembeli hartanah itu membayar RM3,076,803.40 ke dalam akaun anak guam firma guaman tertuduh sebagai deposit untuk pembelian hartanah di bawah SPA. SPA telah dibatalkan apabila penjual gagal melaksanakan pra-syarat penting. Apabila pembeli meminta pemulangan deposit, tertuduh menjawab bahawa atas arahan vendor, sebahagian daripada deposit dikembalikan kepada vendor dan bahagian lain dibayar kepada beberapa pihak ketiga seperti yang dibenarkan oleh vendor. Merasa tertipu, pembeli membuat laporan polis. Susulan siasatan polis, tertuduh didakwa di mahkamah sesyen dengan tiga pertuduhan bersubahat dengan seseorang ('SP6') — yang menyamar sebagai pemilik sebenar hartanah itu — untuk memalsukan SPA dan dua surat kebenaran yang berkaitan dengannya, untuk tujuan menipu menurut s 468 dibaca bersama s 109 Kanun Keseksaan. Ketiga-tiga pertuduhan itu merupakan kesalahan predikat bagi enam lagi pertuduhan pengubahan wang haram terhadap tertuduh di bawah s 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('APPWHPPK'). Pertuduhan pengubahan wang haram mendakwa wang yang merupakan deposit yang diterima daripada pembeli dan kemudiannya diuruskan oleh firma guaman tertuduh adalah hasil daripada aktiviti yang menyalahi undang-undang. Selepas mendengar perbicaraan bersama semua kesalahan predikat dan APPWHPPK, hakim mahkamah sesyen melepas dan membebaskan tertuduh daripada semua pertuduhan pada akhir kes pendakwaan tanpa memanggil pembelaan. Pihak pendakwaan merayu terhadap keseluruhan keputusan itu tetapi kemudian menarik balik rayuannya terhadap pembebasan tertuduh atas kesalahan predikat.

Diputuskan, menolak rayuan dan mengesahkan keputusan mahkamah perbicaraan:

(1) Tiada keterangan kukuh di hadapan mahkamah perbicaraan untuk mendapati tertuduh telah bersubahat dengan SP6 untuk melakukan kesalahan pemalsuan. Sekadar pengakuan SP6 bahawa beliau terlibat dalam SPA tidak secara automatik menjadikan tertuduh bertanggungjawab secara jenayah. Tiada keterangan menunjukkan bahawa tertuduh telah menghasut, bersubahat dengan atau membantu SP6 — semua elemen penting yang perlu dibuktikan oleh pihak pendakwaan — untuk melakukan pemalsuan (lihat perenggan 15–16).

(2) Walaupun menurut s 4(4) APPWHPPK, kesalahan pengubahan wang haram boleh berdiri sendiri daripada kesalahan predikat, bahan utama pelakuan aktiviti yang menyalahi undang-undang oleh tertuduh mesti dibuktikan dan ditubuhkan, yang pada dalam kes semasa adalah kesalahan serius bersubahat dengan SP6 untuk melakukan pemalsuan

bagi tujuan menipu — yang gagal dibuktikan oleh pihak pendakwaan terhadap tertuduh pada peringkat prima facie (lihat perenggan 47).

(3) Bagi membuktikan pertuduhan pengubahan wang haram, pihak pendakwaan telah bergantung sepenuhnya kepada keterangan yang sama yang digunakannya untuk cuba membuktikan kesalahan predikat dengan menunjukkan bahawa tertuduh telah melakukan aktiviti menyalahi undang-undang iaitu bersubahat dengan SP6 untuk melakukan pemalsuan bagi tujuan menipu. Bagaimanapun, hakim perbicaraan tidak menemui hubungan antara tertuduh dan pemalsuan dan telah membebaskan dan melepaskannya daripada kesalahan predikat. Pihak pendakwaan menarik balik rayuannya terhadap pembebasan itu. Oleh itu, oleh kerana tiada keterangan menunjukkan bahawa tertuduh telah melakukan sebarang aktiviti yang menyalahi undang-undang berkaitan SPA, pertuduhan pengubahan wang haram terhadapnya tidak terbukti (lihat perenggan 53 & 55).

(4) Penarikan balik rayuan pihak pendakwaan terhadap pembebasan tertuduh atas kesalahan-kesalahan predikat menunjukkan kurangnya penghargaan bahawa dalam ketiadaan bukti pelakuan kesalahan-kesalahan predikat, tidak ada bukti aktiviti yang menyalahi undang-undang oleh tertuduh dan oleh itu tiada bukti kesalahan pengubahan wang haram seperti yang didakwa terhadapnya. Kesalahan predikat adalah jenayah yang mendasari aktiviti pengubahan wang haram, dan untuk membuktikan kesalahan pengubahan wang haram, pendakwaan perlu terlebih dahulu membuktikan bahawa kesalahan predikat telah dilakukan (lihat perenggan 44–45).

(5) Dapatan dan kesimpulan yang dicapai oleh hakim perbicaraan, termasuk dapatannya mengenai kredibiliti saksi pendakwaan dan keputusannya untuk membebaskan dan melepaskan tertuduh adalah betul dan tidak mewajarkan sebarang campur tangan rayuan (lihat perenggan 56).]

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)
Azmi bin Osman v PP and another appeal [2016] 3 MLJ 98, CA (refd)
Balachandran v PP [2005] 2 MLJ 30, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Dorai Pandian a/l Munian Anor v PP [2009] 4 MLJ 525, CA (refd)
How Chee Hong v PP [2020] 8 MLJ 14; [2020] 2 CLJ 863, HC (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, CA (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Mohd Ismail bin Syed Merah v PP and other appeals [2022] 3 MLJ 786; [2022] 5 CLJ 218, CA (refd)
Ooi Juan Seng v PP [2011] 7 MLJ 409, HC (refd)

Pasupathy a/l Kanagasaby v PP [2005] 1 MLJ 493, CA (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)
PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166, FC (refd)
PP v Genneva Malaysia Sdn Bhd & Ors and another appeal [2021] 9 MLJ 288, HC (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2021] 2 MLJ 469, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Wan Khairil bin Wan Isa [2007] 6 MLJ 601, FC (refd)
R v Chew Chong Jin [1956] 1 MLJ 185 (refd)
Sheo Swarup v King Emperor AIR 1934 PC 227, PC (refd)
Watt (Or Thomas) v Thomas [1947] 1 All ER 582, HL (refd)
Wilayat Khan v State of Uttar Pradesh AIR 1953 SC 1222, SC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 3(1), 4, 4(1)(b), (2), (4), 91, Second Schedule
Criminal Procedure Code ss 165, 173(f)(i), (h)(iii), 316
Evidence Act 1950 s 101
Penal Code ss 107, 109, 415, 468

Norazihah bt Asmuni (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
C Vignesh Kumar a/l Chellapah (with Yasinthra D) (Vignesh Kumar & Assoc) for the respondent.

Muniandy Kannyappan J:

CHARGES

[1] The accused who is respondent to this appeal was charged for commission of nine offences. Three of them are for abetment of an offence of forgery for the purpose of cheating under s 468 of the Penal Code ('the PC/Act 574') read together with s 109 of the PC. These offences are in law referred to as predicate offences committed by him, as he was also charged for six offences of money laundering pursuant to s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUA/Act 613').

[2] The charges (in its original form) are the following:

Case No WA-62K-208–11/2020

First Amended Charge:

Bahawa kamu di antara September 2017 sehingga Mac 2018 di No 38-1, Jalan Telawi, Bangsar Baru, 59100 Kuala Lumpur di dalam Daerah Brickfields, di dalam Wilayah Persekutuan telah bersubahat dengan Ng Cheong Leng (No KP: 570116–05–5367) memalsukan suatu dokumen iaitu: Sale and Purchase Agreement bertarikh 23 Februari 2018 di antara Ng Kee Wei (NRIC NO: 560620–10–6427) dan JMC Ventures Sdn Bhd (Company No 1266985-H) dengan niat supaya dokumen palsu tersebut digunakan bagi tujuan hendak menipu, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil persubahatan kamu, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 109 Kanun Keseksaan [Akta 574] dibaca bersama seksyen 468 Kanun Keseksaan.

Second Amended Charge:

Bahawa kamu di antara September 2017 sehingga Mac 2018 di No 38-1, Jalan Telawi, Bangsar Baru, 59100 Kuala Lumpur di dalam Daerah Brickfields, di dalam Wilayah Persekutuan telah bersubahat dengan Ng Cheong Leng (No KP 570116–05–5367) memalsukan suatu dokumen iaitu: Letter of Authorisation Sale and Purchase Agreement bertarikh 9 Februari 2018 dengan niat supaya dokumen palsu tersebut digunakan bagi tujuan hendak menipu, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil persubahatan kamu, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 109 Kanun Keseksaan [Akta 574] dibaca bersama seksyen 468 Kanun Keseksaan.

Third Amended Charge

Bahawa kamu di antara September 2017 sehingga Mac 2018 di No 38-1, Jalan Telawi, Bangsar Baru, 59100 Kuala Lumpur di dalam Daerah Brickfields, di dalam Wilayah Persekutuan telah bersubahat dengan Ng Cheong Leng (No KP 570116–05–5367) memalsukan suatu dokumen iaitu: Letter of Authorisation Sale and Purchase Agreement bertarikh 14 Februari 2018 dengan niat supaya dokumen palsu tersebut digunakan bagi tujuan hendak menipu, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil persubahatan kamu, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 109 Kanun Keseksaan [Akta 574] dibaca bersama seksyen 468 Kanun Keseksaan.

Case No WA-62K-222–11/2021 and WA-62K-223–11/2021

Case No WA-62K-222–11/2021

First Charge

Bahawa kamu pada 17 Januari 2018 di Public Bank Berhad Cawangan Bangsar, 36 & 38, Jalan Maarof, Bangsar Baru, 59100, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah menerima wang berjumlah RM307,680.40 melalui sekeping cek Ambank (M) Berhad bernombor 901550 daripada Performance Consortium Sdn Bhd (No Syarikat: 861432V), yang merupakan hasil daripada aktiviti haram, ke dalam akaun semasa Public Bank Berhad bernombor 3088506632 milik Firma Guaman Tetuan Mazwan Pathma & Co dan kamu sebagai rakan kongsi di firma guaman tersebut. Oleh yang demikian, kamu telah

melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama yang dibaca bersama seksyen 87(1) Akta yang sama.

Second Amended Charge

Bahawa kamu pada 6 Februari 2018 di Malayan Banking Berhad Cawangan Bangsar Baru Mega, 66, 68 & 70, Jalan Maarof, Bangsar Baru, 59100, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah menerima wang berjumlah RM2,769,123.00 melalui sekeping cek Ambank Berhad bernombor 901551 daripada Performance Consortium Sdn Bhd (No Syarikat: 861432V), yang merupakan hasil daripada aktiviti haram, ke dalam akaun semasa Malayan Banking Berhad bernombor 014123611196 milik Firma Guaman Tetuan Mazwan Pathma & Co dan kamu sebagai rakan kongsi di firma guaman tersebut. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah subseksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama dibaca bersama seksyen 87(1) Akta yang sama.

Third Charge

Bahawa kamu pada 9 Februari 2018 di Malayan Banking Berhad Cawangan Bangsar Baru Mega, 66, 68 & 70, Jalan Maarof, Bangsar Baru, 59100, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah menggunakan wang berjumlah RM180,000.00 melalui sekeping cek Malayan Banking Berhad bernombor 296879 kepada Great Field Resources (No Syarikat: 22446950M), yang merupakan hasil daripada aktiviti haram, daripada akaun semasa Malayan Banking Berhad bernombor 014123611196 milik Firma Guaman Tetuan Mazwan Pathma & Co dan kamu sebagai rakan kongsi di firma guaman tersebut. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama yang dibaca bersama seksyen 87(1) Akta yang sama.

Case No WA-62K-223–11/2021

First Charge

Bahawa kamu pada 9 Februari 2018 di Malayan Banking Berhad Cawangan Bangsar Baru Mega, 66, 68 & 70, Jalan Maarof, Bangsar Baru, 59100, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah menggunakan wang berjumlah RM360,000.00 melalui sekeping cek Malayan Banking Berhad bernombor 296880 kepada YPH Affordable Cooling Servicing (No Syarikat: 2695118V), yang merupakan hasil daripada aktiviti haram, daripada akaun semasa Malayan Banking Berhad bernombor 014123611196 milik Firma Guaman Tetuan Mazwan Pathma & Co dan kamu sebagai rakan kongsi di firma guaman tersebut. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama yang dibaca bersama seksyen 87(1) Akta yang sama.

Second Amended Charge

Bahawa kamu pada 12 Februari 2018 di Malayan Banking Berhad Cawanagn Bangsar Baru Mega, 66, 68 & 70, Jalan Maarof, Bangsar Baru, 59100, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah menggunakan wang berjumlah RM90,000.00 melalui sekeping cek Malayan Banking Berhad bernombor 296881 kepada Segaran a/l Venoo (K/P: 590902–07–5435), yang merupakan hasil daripada aktiviti haram, daripada akaun semasa Malayan Banking Berhad bernombor 014123611196 milik Firma Guaman Tetuan Mazwan Pathma & Co dan kamu sebagai rakan kongsi di firma guaman tersebut. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama yang dibaca bersama seksyen 87(1) Akta yang sama.

Third Amended Charge

Bahawa kamu pada tarikh 8 Februari 2018 di Public Bank Berhad Cawangan Bangsar, 36 & 38, Jalan Maarof, Bangsar Baru, 59100, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, telah memindahkan wang berjumlah RM307,680.40 daripada akaun semasa (Client's Account) Public Bank Berhad bernombor 3088506632 milik Firma Guaman Tetuan Mazwan Pathma & Co, dan kamu sebagai rakan kongsi di firma guaman tersebut ke dalam akaun semasa Public Bank Berhad bernombor 3088506535 milik Firma Guaman Tetuan Mazwan Pathma & Co. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama yang dibaca bersama seksyen 87(1) Akta yang sama.

DECISION BY THE SESSIONS COURT

[3] The above charges were jointly tried pursuant to s 165 of the Criminal Procedure Code ('CPC/Act 593'). The accused was acquitted of all the charges preferred against him, at the end of the case of prosecution. That would include charges for the predicate offences as well as money laundering offences.

[4] Being dissatisfied, the prosecution had appealed against the said decision to this court. Separate notices of appeal were filed. The sessions court judge ('SCJ') who had heard and determined the case of the accused had offered only one judgment which is sufficient in the present case, as the charges were jointly tried and the offences are deemed to have been committed by the accused in the course of one single transaction, pursuant to s 165 of the CPC. As for the offences of money laundering, s 91 of Act 613 is applicable, which provides that where a person is accused of more than one offence under the Act, he may be charged with and tried at one trial for any number of the offences committed within any length of time. However, the dates specified in all the

charges, as reproduced above, ranges from the month of September 2017 to March 2018.

FACTS OF CASE

[5] As for the predicate offences, facts of the case in a nutshell are:

Case No WA-62K-208–11 of 2020:

(a) briefly, the accused was alleged to have abetted one Ng Cheong Leng, who was prosecution witness SP6, whom had impersonated as Ng Kee Wei, to commit an offence of forgery for the purpose of cheating, of three different documents namely:

(i) sale and purchase agreement dated 23 February 2018, tendered as exh P22/ID1;

(ii) letter of authorisation sale and purchase dated 9 February 2018, tendered as exh P3; and

(iii) letter of authorisation sale and purchase dated 14 February 2018, tendered as exh P4

The above documents pertain a sale and purchase transaction of a property situated at Lot No 17, Jalan Raja Chulan, Kuala Lumpur under Geran 79376, Lot 17, Seksyen 17 (to be referred to as Land Lot 17) belonging to the deceased, Ng Kee Wei.

[6] The accused is an advocate and solicitor cum partner of the law firm practising in the name and style of Messrs Mazwan Pathma & Co. He had represented the vendor Ng Kee Wei at the material time in the sale and purchase transaction, whereas Messrs YC Pang, Chong & Gordan represented the purchaser JMC Ventures Sdn Bhd.

[7] The purchaser had paid a deposit of RM3,076.804 which represents 20% of the sale value of Land Lot 17 amounting to RM15,384,020. The said amount of deposit was paid into the client's account of the law firm of the accused person, vide two cheques. The first for an amount of RM307,680, evidenced by exh P7 and the second for an amount of RM2,769,123, evidenced by exh P8.

[8] The sale and purchase transaction did not go through as the precondition to the agreement for the vendor to correct his particulars with the land office vide entry of his national identity card (NRIC) number and address belonging to Ng Kee Wei into the documents of title within a month from execution of the sale and purchase agreement and subsequently serve the said documents of

title on to the solicitor for the purchaser *did not take place*. In the end, the purchaser via his solicitor had sent a letter to inform that the agreement is to be aborted, thus cancelled and had requested for return of the deposit. That became the *bane* to the entire episode in the case against the accused.

[9] The accused as solicitor for the vendor had informed that the monies have been returned to Ng Kee Wei vide cash and also channelled to various third-party accounts as per letter of authorisation issued by Ng Kee Wei.

[10] It has come to light during the case of prosecution that the actual owner of the property Land Lot 17, Ng Kee Wei was deceased since July 2012. The sale and purchase transaction were undertaken by *Ng Cheong Leng who had impersonated as Ng Kee Wei*, by using his identity card, for the purpose of the sale and purchase transaction.

[11] It is an uncontroverted fact that the prosecution witness SP1 Ng Kee Wei had denied of any involvement in the sale and purchase transaction of the said property. Two police reports were lodged by him, exhibited as P2 and P5, as soon as he came to know that his name was improperly used by some quarters in order to commit fraud pertaining a sale and purchase transaction of property which does not belong to him, by misusing his name in the said transaction.

FINDINGS BY THE SCJ

[12] On the law the SCJ had found the following:

The accused person was charged abetting SP6 to forge three documents tendered as proof vide exh P22/ID1, P3 and P4 pertaining the sale and purchase transaction involving Land Lot 17 with the intention to cheat. The offence stipulated in the charges is for abetment of forgery for the purpose of cheating, an offence under s 468 of the PC read together with s 109 of the same Code.

Ingredients of the offence required to be proved by the prosecution under s 109 of the PC as well as s 468 of the PC, are:

(a) the accused person had abetted the crime committed by SP6 pursuant to s 107 of the PC;

(b) resulting from the abetment, the principal offender SP6 had committed a crime, in the present case under s 468 of the PC;

(c) the abetment only takes place if the accused person carries out one of the following acts:

(i) instigates SP6 to commit the crime under s 468 of the PC;

(ii) participates in the crime together with SP6 or conspires with him to commit the act which contravenes the law; in the present case to forge the three documents in order to commit cheating; and

(iii) aiding SP6 to commit the said act amounting to a crime.

As for the offence under s 468 of the PC, the elements to be proved are:

(a) the said documents used are forged;

(b) the principal accused had forged the said documents;

(c) the forgery was commited with the intention to use the documents to cheat and

(d) as for cheating, the elements of deception and inducement as provided for in s 415 of the PC are to be proved.

[13] The SCJ had directed herself correctly on the burden of proof borne by the prosecution which is, it is for the prosecution to prove beyond reasonable doubt the above ingredients of the offence by adducing credible evidence which are believable and free from reasonable doubt. The court must also evaluate the evidence proffered by the prosecution on a maximum evaluation basis in order to decide if the prosecution has been successful in establishing a prima facie case against the accused. Only then the accused would be ordered to enter on his defence.

[14] On the legal principles applicable to the facts and circumstances of the case, the SCJ had also directed her mind correctly on the law pertaining instigation or conspiracy or aiding which has to be clearly proved vide oral and/or documentary evidence to bring home the charges against the accused person.

(a) the case of *Public Prosecutor v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166 was adopted, which decides that an offence of abetment by instigation means that the abettor actively suggests or stimulates the commission of the principal offence. An advice can amount to instigation if it is intended to actively suggest or stimulate the principal offence. The abettor must also necessarily know all the facts constituting the principal offence;

(b) the case of *Pasupathy a/l Kanagasaby v Public Prosecutor* [2005] 1 MLJ 493 was also adopted on the meaning of instigation, where it was decided that a person is said to instigate another person to act, when he actively suggests or stimulates him to act by any means or language, direct or indirect, whether it takes the form of express solicitation, or of hints,

insinuation or encouragement. The word 'instigate' means to goad or urge forward or to provoke, incite, urge or encourage doing an act;

(c) the case of *R v Chew Chong Jin* [1956] 1 MLJ 185 was also adopted on the meaning of conspiracy, where it was decided that it rarely happens that the actual fact of the conspiracy can be proved by direct evidence; since such agreement are usually entered into both swiftly and secretly. It also does not appear that to constitute a conspiracy it is essential a person must have been a party to the wrongful agreement from the start, provided that at some stage before the unlawful act is carried out he joins in the agreement to carry it out; and

(d) on the offence of abetment by aiding, the case of *Ooi Juan Seng v Public Prosecutor* [2011] 7 MLJ 409 was referred to and adopted. It decides that a person abets by aiding, when by act done prior to, or at the time of the commission of an act, he intends to facilitate, and does in fact facilitate the commission thereof.

Premised on the above sources of law, evidence by the prosecution witnesses was evaluated in order to decide if the ingredients of the offence alleged to have been committed by the accused as charged are established. The correct questions were asked by the SCJ, which are:

(i) if the ingredients of the offence of abetment of a crime pursuant to s 109 of the PC have been proved against the accused;

(ii) in the present case, the accused was charged for an offence of abetting Ng Cheong Leng (SP6) who had impersonated as the property owner Ng Kee Wei to forge the salient documents referred to above, with the intention to cheat;

(iii) it is an admitted fact that SP6 was not charged for any criminal offence for his role in the sale and purchase transaction. He merely testified as a prosecution witness against the accused person;

(iv) as an individual who is directly involved in the sale and purchase transaction and the case against the accused, his testimony is material to the case of the prosecution in order to prove abetment of the crime of forgery for the purpose of cheating by the accused person;

(v) SP6 is found to be of no assistance to the case of prosecution to prove the abetment of the said crime by the accused;

(vi) such a finding was made, as there is no evidence forthcoming from SP6 demonstrating that him and the accused had been in communication directly or indirectly showing that the accused had abetted the crime of forgery for the purpose of cheating in the sale and purchase transaction;

(vii) according to SP6, he was introduced to the accused person by one Ravi (identified as Mahendran a/l Subramaniam, SP22) after being informed that the accused would be able to assist in solving his financial woes faced and find a buyer for his property which was to be auctioned;

(viii) on the instruction of Ravi, SP6 had been to the office of the accused person. It was at that office, Ravi had directed SP6 to sign off documents, its content explained to him by Ravi. Ravi is supposed to have told SP6 that the signature on the documents was 'to put on the show only' and the solicitor would manage the entire transaction;

(ix) SP6 admitted to have followed the instruction by Ravi, as the property does not belong to him and the signature affixed on the said documents was not his real signature. Reference is made to exh P22/ID1, P3 and P4. He too did not receive any payment after having signed the said documents and he was also not contacted by the accused after that, at any time;

(x) however, it is contended by the prosecution that the act of abetment by the accused was, his instruction to SP6 via Ravi to sign the said documents at his law office at Messrs Mazwan Pathma & Co;

(xi) that contention was rejected by the SCJ for the following reasons:

(1) there has been no evidence directly or indirectly showing that the accused had instructed SP6 to sign the said documents via Ravi. *To the contrary, during cross-examination of SP6, he had testified that the instruction in toto came only from Ravi and not the accused*;

(2) there is also no evidence pointing to the fact that Ravi had received instruction from the accused to get SP6 to sign the said documents;

(3) cross reference to the testimony of Ravi @ Mahendran a/l Subramaniam (SP22) shows that he did not at any point of time met the accused or even communicated with him. This *per se* negates any form of instruction given by the accused to Ravi;

(4) presence of SP6 at the law firm of the accused and to have signed the said documents in the presence of the accused, by itself, in the absence of any other evidence does not show complicity by the accused or his active involvement in the sale and purchase transaction and that he had abetted the commission of crime of forgery for the purpose of cheating by SP6; and

(5) in a nutshell, factually the role and involvement of the accused came to a naught, on his involvement to instigate, conspire or aid SP6 to forge the said documents.

ANALYSIS

[15] Therefore, wanting in the case of prosecution is the evidence of abetment by the accused in the crime committed by SP6. Admission by SP6 on his involvement in the sale and purchase transaction does not automatically latch criminal liability on the part of the accused person. There has been absence of cogent evidence, directly or circumstantially, pointing clearly on the involvement of accused, for the trial court to even arrive at a finding inferentially that the accused was criminally involved premised on the evidence tendered by the prosecution.

[16] The testimony of SP6 does not in any way support the case of the prosecution that the accused had abetted the crime committed by him, either by way of instigation, assistance or conspiracy in the sale and purchase transaction involving Land Lot 17. Absence of such evidence has a crippling effect on the case of the prosecution, thus wanting in proof of the ingredients of the offence pursuant to s 107 of the PC, and consequently s 109 of the PC.

[17] Aside testimony of SP6, evidence elicited from other prosecution witnesses too upon maximum evaluation do not point toward proof of the crime of abetment as charged. The narrative unfolds that the law firm of the accused was involved in the sale and purchase transaction, commencing from the point of sharing of information between the real estate agent Lim Teck Lee (SP2) and Lai Wai Ping (SP3), Ray Wong and another by the name of Allen who had endeavoured to find a purchaser for Land Lot 17.

[18] According to SP3, he knew of the sale of Land Lot 17 from one Allen and the said information was shared with SP2. Further to that, SP2 contacted Ray Wong, and later they were successful in procuring an interested purchaser. SP2 then infomed of it to SP3, who had in turn informed Allen, who had requested SP3 to inform the purchaser to deal with the accused, who was representing the vendor. It has to be emphasised that the existence of *Allen* is dubious and cannot be confirmed, as his details was not rendered to the investigation officer (IO) of the case for further or onward investigation.

[19] It is an uncontroverted fact that the purchaser of the property was JMC Ventures Sdn. Bhd. owned by Moo Sze Foo (SP9) and his partner Dato Tan Kak Seng (SP17). SP9 had visited the location of the property based on the grant of the said land given to him by Ray Wong, who had received it from SP3. SP3 had testified that he had met up with the accused person in order to obtain the grant of the said land. Evidence once revealed that the said grant was handed over to the accused by one Janasekaran a/l Muniandy (SP7) via Magentheran a/l M Muniandy (SP18). SP7 had testified that he had in fact received the said grant from one *Richard* in order to search for a purchaser.

[20] On deciding to purchase the said land, Messrs YC Pang, Chong & Gordan was appointed as solicitor for the sale and purchase transaction for and on behalf of the purchaser. According to Sim Hui Lens (SP8), he had contacted the accused to obtain further particulars for the purpose of preparing a draft agreement and he was asked to make payment of the deposit for the purchase and to be paid into the client account of the law firm of the accused. After confirmation of the terms of the agreement, a copy of the agreement was given to the accused in order for the vendor of the said property to affix his signature. Finally, the agreement was signed by both the purchaser and vendor individually and separately in the presence of their respective solictor.

[21] Easing back into the testimony of SP6, his involvement in the transaction commenced when he was introduced to Ravi by his friend, one *Ganesh*. Purpose of introduction was to assist in the financial woes faced by him and also to find a buyer for his house, which was to be auctioned off. According to SP6, when the effort to find a buyer for his house did not materialise, Ravi had suggested to SP6 to obtain assistance from the accused.

[22] SP22 Mahendran a/l Subramaniam admitted in court that he knew Ravi and had met SP6 at Paparich Bangsar in the presence of Ganesh, SP7 and SP18. According to SP22, at the said meeting SP7 and SP18 had spoken to SP6 on the said land and what had to be done. SP22 confirmed in court that he has not met the accused nor spoke to him at any time.

[23] By virtue of the testimony of SP2, SP3, SP7, SP8, SP9, SP17, SP18 and SP22, as alluded to above, the SCJ had found as a fact that there is no cogent evidence implicating the accused and that he abetted the crime as alleged in the charges against him. Apart from acting as solicitor for the sale and purchase transaction for and on behalf of the vendor, the testimony of prosecution witnesses had failed to show that the accused had rendered any instruction, arranged a plan, had knowledge or did any act to abet the commission of crime by SP6 who had forged the sale and purchase documents and other related documents, alluded to above.

[24] Aside that, the SCJ too had found there has been significant contradictions or inconsistencies in the testimony of SP6, SP7, SP18 and SP22 on their relationship with the accused person, also showing that he did not abet the crime as alleged.

[25] The material contradictions found are:

(a) SP6 had testified that he went to the law firm of the accused to sign documents on the instruction of SP22, and upon explanation on its

content by SP22, he had signed those documents. But the testimony of SP22 showed otherwise, as he said he never met the accused, nor spoke to him ever before;

(b) SP22 in his testimony had said there was a discussion amongst SP6, SP7 and SP18 on Land Lot 17 and the sale and purchase transaction that had entailed. However, SP18 in his testimony said that he has never met SP6 nor know of him; and

(c) SP7 too denied knowing SP6 and the accused.

[26] It is axiomatic that the rule of evidence demands, due to material contradictions in the testimony of prosecution witnesses, they cannot be believed per se, as their evidence would be inherently not credible and doubtful. Pursuant to the material contradictions, the SCJ had correctly decided that there is no iota of evidence to implicate the accused with the crime of abetment alleged against him.

ARE THE ELEMENTS OF THE OFFENCE OF FORGERY FOR THE PURPOSE OF CHEATING PROVEN?

[27] Surveying the evidence proffered by the prosecution, the following are explicit:

(a) the documents have been forged;

(b) testimony of SP6 shows that he had admitted that Land Lot 17 does not belong to him, yet he signed the said documents constituting the sale and purchase transaction on the instruction of SP22;

(c) he had impersonated as the land owner Ng Kee Wei; and

(d) the said land belongs to Ng Kee Wei who was deceased since July 2012, as confirmed by SP13 Ng Kim Chuan @ Ng Sing Seong, son of the deceased.

[28] Therefore, the prosecution has been successful in proving that the salient documents for purpose of the sale and purchase transaction have been forged by SP6 for the purpose of cheating. Resulting from that, SP17 was deceived, who was thus induced to have delivered an amount of RM3,076,803.40 by transferring it into the client's account of the law firm of the accused as payment of 20% deposit for the said sale of land after execution of P22/ID1.

[29] However, the above does not afford proof of abetment of the crime of forgery for the purpose of cheating pursuant to s 468 of the PC as the person engaged in the criminal conduct of forgery for the purpose of cheating was

SP6. It was without any assistance, instigation or conspiracy by the accused. Forgery *per se* without any involvement or participation of the accused does not render him liable for the crime of abetment as alleged against him, since there is no positive act or encouragement, instigation or assistance by him.

[30] At the end of the case of prosecution what is expected of the SCJ is for maximum evaluation of the evidence tendered by the prosecution which had been subjected to vehement cross-examination by the accused via his counsel. The SCJ shall in law deal with the facts and arrive at definite conclusions based on admissible evidence available at the close of case of prosecution. She is also required in law to meticulously scrutinize the evidence available in its entirety in order to ascertain if the ingredients of the offence forming subject matter of the charges against the accused have been established. That necessitates a careful and categorical perusal and appraisal of not only the individual strands of evidence of each witness but also totality of their evidence before concluding on a well-reasoned basis that a prima facie case has or has not been established by the prosecution. Thus, it would be insufficient for *in vacuo* consideration of only parts of the evidence of witnesses. The entire evidence of each witness should be considered, evaluated and balanced against the remaining evidence offered by each of the prosecution witness during the trial. A fair, just, reasonable and balanced appraisal of the evidence tendered by the prosecution during examination in chief, cross-examination and re-examination of each witness ought to be undertaken and weighed in the context of the evidence in its entirety (see*: Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; *Balachandran v Public Prosecutor* [2005] 2 MLJ 30; *Public Prosecutor v Wan Khairil bin Wan Isa* [2007] 6 MLJ 601). The SCJ after having embarked so, had arrived at a finding and conclusion that the prosecution had been unsuccessful in proving a prima facie case on the predicate offence of abetment of the crime of forgery for the purpose of cheating by the accused, pursuant to s 468 of the PC read together with s 109 of the PC. Thus, the accused was acquitted and discharged of all charges for the predicate offences.

FACTS OF CASE INVOLVING OFFENCE OF MONEY LAUNDERING

[31] Resulting from investigation into the predicate offence, the investigation officer (IO) of the case, Insp Muhammad Kamallul Hayat (SP23) had lodged a police report P46 against the accused, stating that he had committed an offence of money laundering pursuant to Act 613 pertaining receipt, transfer and use of monies obtained from the sale and purchase transaction of Land Lot 17. ASP Siti Hajar bt Mohamad (SP24) took over the money laundering investigation.

[32] The offence of money laundering is supposed to have arisen out of the sale and purchase transaction involving Land Lot 17 whereby JMC Ventures

Sdn Bhd as the purchaser had pursuant to request by the vendor via the law firm of the accused had paid the deposit amounting to RM3,076,804, equivalent to 20% of the sale price of the land vide two cheques of Ambank Berhad (exh P7 and P8) issued from the account of Performance Consortium Sdn Bhd into the client account of the law firm Messrs Mazwan Pathma & Co.

[33] The sale and purchase agreement were not completed as amendment to the identity card number of the vendor could not be made to the documents of title at the land office within the time frame stipulated in the agreement, thus the entire transaction was out of time. When solicitor for the purchaser had requested from the vendor for return of the deposit, *the accused who was representing the vendor had informed that the monies had been paid to third parties in accordance with the advice and instruction of his client.* Rightly so, as the account concerned was a client's account, wherein its transaction had to be dealt with in accordance with instruction of his client and not independently of the client by the accused. But, suspecting that the purchaser was cheated, Tan Kak Seng (SP17) had lodged a police report, P37.

[34] The investigation carried out by SP24, and testimony of witnesses from the Bank only point towards the movement of monies, in and out from the account of Messrs Mazwan Pathma & Co, which are in the main:

(a) current account number 3088506632 at Public Bank Bhd;

(b) current account number 014123611196 at Maybank Bhd;

(c) current account number 3088506535 at Public Bank Bhd; and

(d) third-party account belonging to SP7, SP12 and SP22.

FINDINGS BY THE SCJ AND ANALYSIS

[35] The ingredients of the offence of money laundering which has to be proven by the prosecution beyond reasonable doubt pursuant to s 4(1)(b) of Act 613 are that:

(a) the accused person had received/used/transfer proceeds from unlawful activity;

(b) the proceeds from unlawful activity stems from the serious offence, as listed in the Second Schedule to Act 613 , which in the present case is abetment of crime of forgery for the purpose of cheating; and

(c) the accused knows or has reason to believe that the said property or proceeds originated from the said unlawful activity.

For sake of completeness, 'serious offence' is defined in s 3(1) of Act 613 to mean any of the offences specified in its Second Schedule, which also include

the abetment of those offences. Section 468 of the PC is listed in the said schedule.

> 'unlawful activity' means any activity which constitutes a serious offence or any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence.
>
> 'proceeds of an unlawful activity' means any property or any economic advantage or economic gain from such property which is wholly or partly derived or obtained, directly or indirectly, by the accused person;
>
> derived or obtained from a disposal or other dealings with the property referred to; or
>
> acquired using the property derived or obtained by the accused person through any disposal or other dealings or
>
> which wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property can be reasonably believed to be property falling within the scope of proceeds of an unlawful activity.

[36] In a nutshell, basis for charges for offences of money laundering under Act 613 against the accused arises from the allegation that he had been involved in dealing with the proceeds of an unlawful activity, to wit, by abetting SP6 to impersonate as Ng Kee Wei as owner of Land Lot 17 when he signed documents P22/ID1, P3 and P4 which is meant for purpose of the sale and purchase transaction involving the said land which in fact does not belong to him, and resulting from forgery of the said documents, the accused as solicitor for the vendor had received/used/transferred the monies in the form of deposit paid by the purchaser to the vendor and by doing so, abetted SP6 to commit forgery for the purpose of cheating.

[37] As proof of the unlawful activity vis a vis serious offence, alleged to have been committed by the accused, the prosecution had merely relied on the evidence tendered in respect of commission of the predicate offences, which was found by the SCJ not to have been proven, not even prima facie.

[38] Flowing from that, contention by defence counsel sways in favour of the accused — as there is no proof tendered by the prosecution on commission of the serious offences of abetment of an offence of forgery for the purpose of cheating — there is also no proof of the unlawful activity — further, proof by prosecution as to dealing with the proceeds of that unlawful activity by the accused is also wanting. The root of the money laundering offences is dealing with proceeds derived from the alleged unlawful activity. Since, that is not established, the deposit paid by the purchaser to the vendor into the client account of the law firm of the accused and later disbursed according to explicit instruction of his client cannot amount in law to be dealing with proceeds

derived from an unlawful activity. The effect being, in the absence of proof by prosecution, a prima facie case for an offence of money laundering is not established against the accused to show evidently that the accused had dealt with the deposit sum he had received on behalf of the vendor as stakeholder in his firms's client account on his volition for his gain or advantage. The ensuing transaction aftermath was according to the evidence adduced, on the explicit instruction of his client to third party accounts.

[39] Case authorities like *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98, *How Chee Hong v Public Prosecutor* [2020] 8 MLJ 14; [2020] 2 CLJ 863 and *Mohd Ismail bin Syed Merah v Public Prosecutor and other appeals* [2022] 3 MLJ 786; [2022] 5 CLJ 218 were relied on by the prosecution to demonstrate to the court that the offence of money laundering is a stand-alone offence and it is sufficient for the prosecution to only show a serious crime existed, to attract the commission of an offence of money laundering by the accused, regardless of the fact he was acquitted of the serious offence. Reliance is on s 4(4) of Act 613.

[40] The said contention was agreed to by the SCJ as it is premised on past precedents as well as s 3 and 4 of Act 613, specifically s 4(4), which stipulates that a conviction for an offence of money laundering is not subject to the conviction for a predicate offence, *so long as all the ingredients of the offence of money laundering has been proved by way of credible evidence*.

[41] So what *sticks out like a sore thumb*, in the present case is the lack of proof vide credible evidence by the prosecution of the ingredients of the offence of money laundering. As the prosecution had completely relied on the proof tendered for the predicate offences, as proof of commission of the unlawful activity by the accused, the case in its entirey had fallen, since the serious offence forming the unlawful activity was decided not to have been proved by the prosecution. The following submission is testimony:

> 26. Pihak pendakwaan bagi kes AMLA memohon untuk menggunapakai hujahan predikat di akhir kes pendakwaan bagi tujuan pembuktian aktiviti haram yang dilakukan oleh OKT yang telah dipertuduhkan di bawah seksyen 468 KK dan dibaca bersama seksyen 109 KK.

[42] It also coincides with the testimony of SP24, the IO for the offence of money laundering. She had testified in no uncertain terms that her investigation was only on the money trail. In respect of the predicate offences, she had completely relied on the investigation by SP3. At the risk of repetition, to reiterate, since the prosecution had failed to establish a prima facie case on the predicate offences, proof of unlawful activity for purpose of the money laundering offence is lacking. Receipt of deposit into his firm's client account does not *per se* amount to receipt of proceeds of an unlawful activity, without

tangible proof to show that the proceeds are from the alleged act of abetment by him of SP6 to forge salient documents pertaining the sale and purchase transaction of Land Lot 17, for which case he was acquitted in law. In turn, the deposit received in his firm's client account and dealt by him on the explicit instruction of his client only goes to show it was not a dealing on his volition to his gain or advantage but on the instruction of his client, as it was meant to be. Thus, it is not money laundering.

[43] Although there is evidence from SP24 and Bank officers on the movement of monies from the purchaser of Land Lot 17 into the client account belonging to the law firm of accused, which had been channelled to other accounts on the instruction of his client, but the receipt/utilization/transfer of said monies per se does not tantamount to proof of a money laundering offence, simply because the prosecution had failed to prove vide credible evidence on the nexus with an unlawful activity, alleged to have been committed by the accused. Hence, the alleged unlawful activity and dealing with its proceeds, which are the principal ingredients of an offence of money laundering, are not proven by the prosecution.

[44] The above is also consonant with the law as decided and declared by the superior courts, like in the case of *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763 by His Lordship Idrus Harun JCA (later FCJ) endorsed later by the Federal Court in the case of *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2021] 2 MLJ 469, showing crystal clear that act of the accused would only be money laundering if the prosecution is able to show that the accused was engaged directly or indirectly in a transaction involving proceeds of an unlawful activity. Further, by virtue of sub-s 4(2) of Act 613, it may be inferred from objective factual circumstances that the accused knew or had reason to believe that the sums seized were in fact proceeds from any unlawful activity, or he had without reasonable excuse failed to take steps to ascertain whether or not the sums seized were proceeds from any such unlawful activity. From the record of evidence available, it is manifestly clear that the prosecution had failed to establish a link between the property received to the purported illegal transaction or unlawful activity and the proceeds transmitted into the client's account of the law firm of the accused are as a result of the predicate offences alleged to have been committed by the accused. Demonstrably, under the law, the prosecution is left without an alternative but to prove that the proceeds of the unlawful activity derived by the accused must bear an inextricable link with the predicate offence and/or unlawful activity, before it could continue to mount proof against the accused for an offence of money laundering pursuant to s 4(1)(b) of Act 613. At the risk of repetition, in the present case, there is no such evidence tendered by the prosecution, apart from the money trail, which seems to be the natural course of events on transmission of monies into the client's account of the law firm of

the accused, followed by withdrawal of the same on the instruction of his client. That *per se* does not show that the accused was involved in dealing with proceeds of an unlawful activity, without any proof that it was such an activity. Moreover, conduct of the prosecution is riddled with an inconsistent stand taken by them, as after advocating to the court that proof of the unlawful activity forming the offence of money laundering emanates from the proof of the predicate offences, but after obtaining an acquittal of the charges bearing the predicate offences, it chose to withdraw the appeal against the said acquittal on the basis that the money laundering offence is a stand-alone offence. Such a position taken, shows lack of appreciation on the fact and law, that in the absence of proof of the predicate offences, there is no proof of an unlawful activity by the accused, hence there is also no proof of the offence of money laundering as alleged against him. With that, the prosecution had failed to discharge its burden of proof pursuant to s 101 of the Evidence Act 1950 ('the EA/Act 56') to have proven beyond reasonable doubt that the accused had in fact committed an offence of money laundering. It is not a choice for the prosecution to pick and choose what it wishes to prove but to have only complied with the law as stipulated in Act 613. Flowing from that, in the absence of proof, left is only a surmise, conjecture or suspicion that the accused had committed an offence of money laundering. Benefit of the doubt favours the accused, hence rightly acquitted.

[45] Unlawful activity as defined in s 3(1) of Act 613 is to mean, inter alia, any activity which constitutes any serious offence, which is also defined in the same section as any of the offences specified in the Second Schedule. In this appeal, the serious offence in issue, is the offence under s 468 of the Penal Code read with the abetment provision under s 109 of the Penal Code, it being one of the offences specified in the Second Schedule to Act 613. This is the predicate offence which is the crime underlying the money laundering activity. Therefore, to prove the offence under s 4(1)(b) of Act 613, the prosecution *shall first* prove the predicate offence under s 468 of the Penal Code read together with s 109 of the Penal Code. Thus, mere proof of payments and money trail in and out of the client account belonging to the law firm of the accused, is *insufficient* to prove the predicate offence under ss 468/109 of the PC, and then commission of the offence under s 4(1)(b) of Act 613. Exactly so in the present case, as could be discerned from testimony of the investigation officer SP24 who had investigated the offence under Act 613. She had honestly testified that investigation into the offence under Act 613 is dependent on the fruits of the investigation into the predicate offences. Since SP24 was the principal witness to prove the offence of money laundering against the accused, the prosecution is bound by it (see: *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14). Flowing from that, ingredients of the offence of money laundering under Act 613 is wanting in proof of the following:

(a) the accused was engaged, either directly or indirectly, in a transaction that involves the impugned monies;

(b) the impugned monies are the proceeds of an unlawful activity;

(c) that the unlawful activity is the offence of abetment of forgery for the purpose of cheating; and

(d) from the objective circumstances it cannot be inferred factually that the accused knew or had reason to believe that the monies are the proceeds of an unlawful activity.

(See: *Public Prosecutor v Genneva Malaysia Sdn Bhd & Ors and another appeal* [2021] 9 MLJ 288 (HC).)

[46] In sum total, the prosecution had failed to establish a *prima facie* case against the accused on both the predicate offences as well as the offence of money laundering which are alleged to have been committed by the accused. With that, the allegation remains so, without admissible credible evidence as proof of it. So, the accused was rightly acquitted of all charges against him.

CONCLUSION AND DECISION

[47] This appeal by the PP flows from the acquittal and discharge of the accused of all the charges preferred against him. Although pursuant to s 4(4) of Act 613, an offence of money laundering could stand alone from the predicate offences, the principal ingredient of commission of an unlawful activity by the accused has to be proved and established, which in the present case has to be the serious offence of an abetment of forgery for the purpose of cheating which was not proven by the prosecution, at the prima facie stage.

[48] Surveying the record of proceeding, comprising notes of evidence, documentary exhibits as well as grounds of judgment by the SCJ, it is apparent that the SCJ has arrived at correct findings of fact and conclusions on the law, based on the facts and evidence tendered before her. There has been sufficient and proper judicial appreciation of the evidence tendered when she found that the prosecution had failed to prove a prima facie case on the charges for the offences committed by the accused. She was in a better position to assess credibility of witnesses, since she had the audio visual and video advantage over them, unlike this court in the exercise of its appellate jurisdiction could only act on the cold print evidence available and shall be slow to disturb the findings made by the SCJ unless it is plainly wrong and there are cogent reasons for doing so, which I found none.

[49] Further, in order to justify appellate intervention, findings of fact made

by the SCJ has to be perverse; against the weight of evidence; incongruent with the applicable law on the penal offences alleged to have been committed by the accused; the rule of evidence applicable has not been complied with. So, the pivotal question, what is left to be decided in the present appeal?

[50] On curial scrutiny of the evidence tendered by the prosecution, the SCJ has directed herself correctly:

(a) on the ingredients of offences to be proved by the prosecution;

(b) she had embarked on a maximum evaluation of the evidence proffered by the prosecution which was tested by way of cross-examination by the defence counsel;

(c) when evaluating the evidence tendered, she had combed through it together with the documentary exhibits tendered in support as proof of the charges against the accused;

(d) the relevant laws being the Penal Code, Evidence Act and Act 613 have been correctly applied;

(e) pn the discharge of the burden of proof by the prosecution, it was correctly adhered to, wherein the accused has to only rasie a reasonable doubt on the case of prosecution;

(f) pertinent findings of fact on credibility of witnesses for the prosecution, specifically SP6 who is a material witness for the prosecution and from whom the entire offence originated, but he was not charged and prosecuted for a penal offence but instead testified as witness for the prosecution against the accused;

(g) at the risk of repetition, the SCJ was in a better position to decide on the credibility of prosecution witnesses, since they testified before her, rendering her finding on their credibility and reliability of their evidence after having considered the apparent and material discrepancies and contradictions amongst them correct; and

(h) it was only after that she decided to acquit and discharge the accused without him having to enter on his defence, simply because the prosecution had failed to establish proof of a prima facie case on the charges preferred against the accused.

[51] In the exercise of appellate jurisdiction, proper weight and consideration is given to matters viz views of the SCJ on credibility of the witnesses for the prosecution especially SP6; presumption of innocence in favour of the accused; right of the accused to benefit of any doubt; and slowness of this court in disturbing a finding of fact arrived at by the SCJ who had the advantage of seeing and hearing the witnesses for the prosecution. Further, as

the SCJ had tried a question of fact and there has been no misdirection or non-direction followed by sufficient explanation and justification of her findings and conclusions, I do not find any compelling reasons to interfere with the order of acquittal made (see: *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 1222 at pp 123 and 125; *Watt (Or Thomas) v Thomas* [1947] 1 All ER 582, *Sheo Swarup v King Emperor* AIR 1934 PC 227).

[52] It is also a glaring fact that albeit an appeal lodged on the order of acquittal on the charges for predicate offences, it was subsequently withdrawn by the prosecution, thus deeming it fit to only pursue with the current appeal on the order of acquittal on the charges for offences of money laundering.

[53] Combing through the evidence proffered in this case, it is also clear as crystal, that the prosecution had relied on the proof tendered for the predicate offences in order to prove the commission of unlawful activity by the accused forming proof of the money laundering offences cited against him. Evidently, the proof afforded by the prosecution for the predicate offences stands parallel to proof of the commission of unlawful activity by the accused. As such is the stand taken by the prosecution, it cannot now blame the SCJ for acquitting the accused on the money laudering charges, as the proof afforded for the predicate offences had fallen like a hopelessly arranged *pack of cards.* The SCJ had arrived at a finding of fact, concretely supported by tangible evidence that there was no nexus between the accused and the allegation of abetment of forgery for the purpose of cheating, which stands as proof of unlawful activity in the case of prosecution and pursuant to the evidence tendered by the prosecution, the entire transaction forming subject-matter of the charges was in fact master minded by SP6 and there is no evidence to show that the accused had abetted it at any point of time. To the contrary, the accused, pursuant to cross-examination of all the witnesses for prosecution by his counsel, was successful in proving to the court that there was no nexus between him and the unlawful activity hatched by SP6. The only apparent fact was that he was genuinely representing the vendor of the property involved in the sale and purchase transaction. There has been no iota of evidence to show that he was acting for them or employed for a sinister motive.

[54] In support of this appeal, the prosecution had contended that this court has to peruse the evidence available, and on the basis of objective factual circumstance, the accused is supposed to have known he was involved in an unlawful activity, thus the proceeds received and utilized by him in his capacity as the solicitor of the law firm involved in the sale and purchase transaction was as a result of money laundering, and therefore this court has to order for him to enter his defence on the charges for the offences of money laundering. But

based on objective factual circumstance, it is apparent from the evidence adduced, the accused is not complicit to the sale and purchase transaction in an illegal manner, but he had acted professionally as the solicitor for the purchaser of Land Lot 17 and the proceeds and funds received, were transferred to third party accounts. It was not done on his volition but on the explicit instruction of his clients. This supports the finding of fact by the SCJ, that the accused was not an abettor to the commission of forgery for the purpose of cheating by SP6, and he is not involved in any form of unlawful activity forming an offence of money laundering pursuant to s 4(1)(b) of Act 613. As he is found not to have abetted SP6, there is also no proof to show that he has in fact any nexus whatsoever with an unlawful activity, as required under s 4(1)(b) of Act 613. It is emphasized that the law pursuant to Act 613 stipulates that a money laundering offence is *distinct* from the predicate offence and must be supported by evidence. Viewing the evidence tendered by the prosecution via SP6, SP7, SP18 and SP22, it is obvious that their testimony does not point toward abetment by the accused of the crime of forgery for the purpose of cheating with SP6 of the salient documents involved in the sale and purchase transaction of Land Lot 17. In that regard, the prosecution has been unsuccessful in proving commission of the unlawful activity by the accused vis abetting SP6. Moreover, the case of the prosecution is riddled and derailed by contradicitons of their testimony, throwing their case into an abyss. It being:

(a) according to SP6, SP22 was the person by the name of Ravi/Magenthiran;

(b) according to SP22, SP18 was the person by the name of Ravi/Magenthiran;

(c) according to SP7, Ravi and Magenthiran are two different individuals;

(d) according to SP18, he is not Ravi/Magenthiran and he claims not to have met SP6;

(e) SP22 is supposed to have met up with SP6, SP7 and SP18 at Paparich Bangsar; and

(f) but both SP7 and SP18 denies the presence of SP6.

In sum total, all of them, SP6, SP7, SP18 and SP22 were exculpating themselves from being blameworthy by adducing contradictory evidence on their involvement in the predicate offence. When accounts of transaction come from testimony of difference witnesses, it is only possible to pick out contradictions and inconsistencies between them. It has created an apparent and vast impression on the mind of the SCJ. The contradictions and discrepancies in testimony of the witnesses are material which goes to the root of the charges against the accused person. The SCJ is in the best position to consider it as she was the one who saw and heard the evidence (see: *Andy bin*

Bagindah v Public Prosecutor [2000] 3 MLJ 644; *Dorai Pandian a/l Munian & Anor v Public Prosecutor* [2009] 4 MLJ 525). Such being the plank of the case of prosecution, how could there be proof beyond reasonable doubt of the unlawful activity by the accused *vis a vis* his abetment or involvement with SP6. Left is only unreliable and untrustworthy evidence to prove the ingredients of the money laundering offence by the accused. In the oft quoted case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 275, Abdoolcader FJ (as he then was) when delivering the judgment of the Federal Court said:

> The Privy Council said in *Caldera v Gray* that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seem, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

[55] To recap, surveying the definition of serious offence, unlawful activity and proceeds of an unlawful activity in Act 613, it is apparent there is a nexus amongst the three forms of *actus reus* before it culminates into commission of a money laundering offence. As the prosecution chose to prefer a charge under s 4(1)(b) of Act 613, it bears the bounden duty under the law to prove beyond reasonable doubt that the accused did in fact commit an unlawful activity emanating from commission of the serious offence. If that is not proven by the prosecution, charges of money laundering are deemed not proven, simply because an offence of money laundering involves dealing with proceeds of an unlawful activity. Thus, in the absence of proof of an unlawful activity, the issue of dealing with the proceeds of an unlawful activity would become otiose, hence no offence of money laundering is committed by the accused person. In the present case, the prosecution had chosen to anchor its proof of commission of unlawful activity by the accused, on the proof of the predicate offences, which is also a serious offence under Act 613. The said proof had ended up in a naught, as it had failed even to prove the threshold of a *prima facie* case as required under s 173(f)(i) read together with s 173(h)(iii) of the CPC. In addition to that, post acquittal of the predicate offences, the prosecution had withdrawn the appeal it had lodged agsinst the said order of acquittal and discharge. Thus, in the absence of proof of an unlawful activity by the accused, the ingredients of the offence of money laundering is also not proven by the prosecution.

[56] To conclude, this court finds that the findings and conclusion arrived at by the SCJ, including her finding on the credibility of the prosecution witnesses is correct, thus there is no justification for appellate intervention and the order of acquittal and discharge of the accused by the SCJ is correct and it

corresponds with the evidence and proof tendered by the prosecution. Thus, the appeal by the prosecution is dismissed pursuant to s 316 CPC, as there are no sufficient grounds for interfering with the decision by the SCJ. The accused thus stands acquitted and discharged of the charges preferred against him.

Appeal dismissed, accused stands acquitted and discharged.

Appeal dismissed and trial court's decision affirmed.

Reported by Ashok Kumar